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No. 91-520

Supreme Court, U.S.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

VILLAGE OF PALESTINE AND PATRICK W. SIMMONS,
PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in considering a petition for an exemption from a provision of the Interstate Commerce Act governing rail line transfers and assignments of trackage rights (49 U.S.C. 11344), the Commission could properly limit its consideration of the Rail Transportation Policy, 49 U.S.C. 10101a, to those elements of the policy that correspond to the standards the Act would apply if no exemption were available.

2. Whether, with respect to the transaction at issue in this case, the Commission properly concluded that employee concerns embodied in Section 10101(a)(12) of the Rail Transportation Policy would be satisfied by imposition of the Commission's standard labor protective conditions.

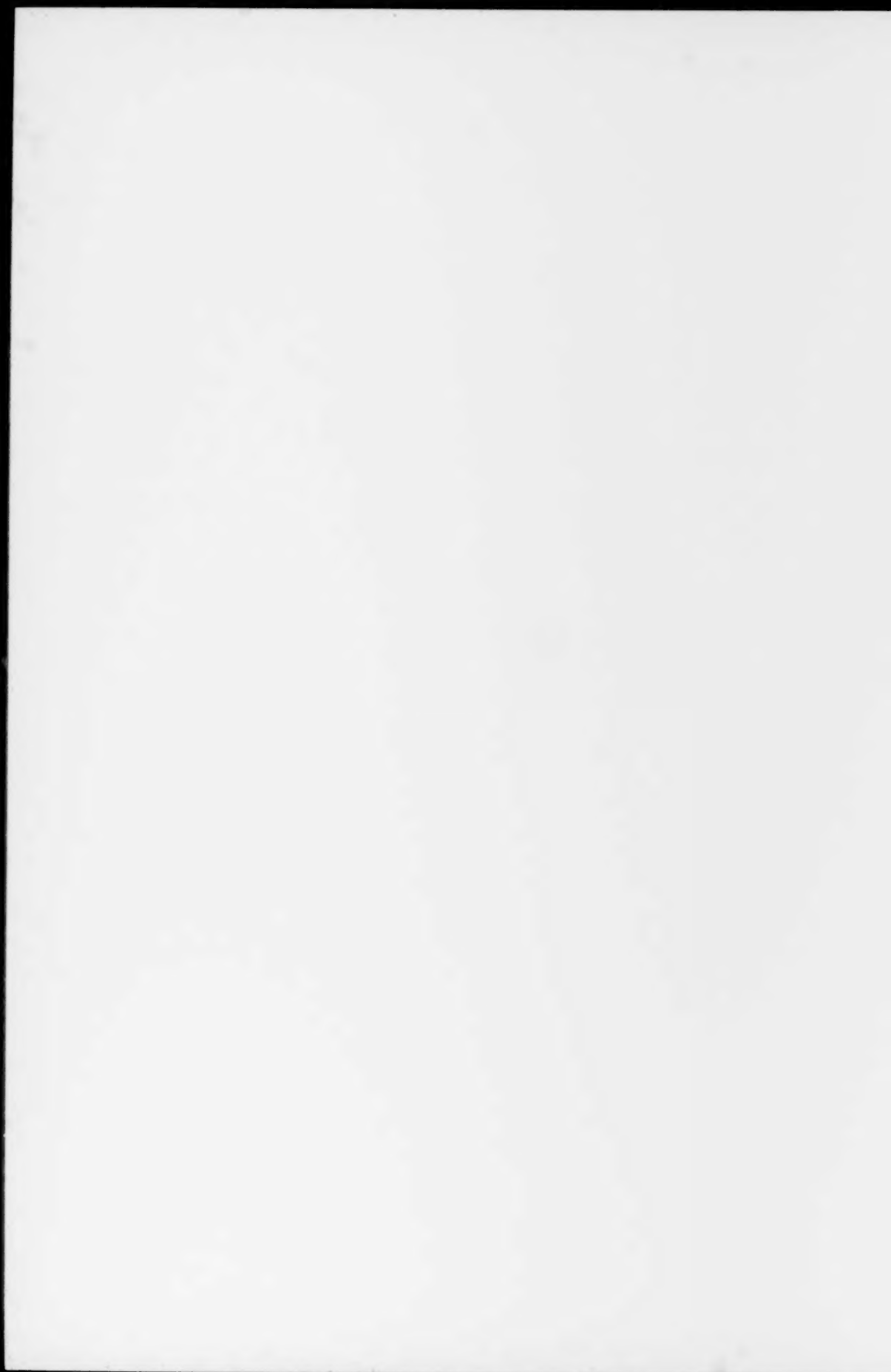


TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction.....	1
Statement.....	2
Argument.....	8
Conclusion.....	13

TABLE OF AUTHORITIES

Cases:

<i>American Trucking Ass'ns v. Atchison T. & S.F. Ry.</i> , 387 U.S. 397 (1967).....	11
<i>American Trucking Ass'n v. ICC</i> , 656 F.2d 1115 (5th Cir. 1981).....	9
<i>Blackstone Capital Partners, L.P.—Control Exemption—CNW Corp.</i> , 5 I.C.C.2d 1015 (1989).....	10
<i>Brae Corp. v. United States</i> , 740 F.2d 1023 (D.C. Cir. 1984), cert. denied, 471 U.S. 1069 (1985).....	10
<i>Brotherhood of Maintenance of Way Employees v. United States</i> , 366 U.S. 169 (1961).....	13
<i>Brotherhood of Ry. Carmen v. ICC</i> , 917 F.2d 1136 (8th Cir. 1990).....	10
<i>Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837 (1984).....	8
<i>CMC Real Estate Corp. v. ICC</i> , 807 F.2d 1025 (D.C. Cir. 1986).....	9, 10
<i>ICC v. New York, N.H. & H.R.R.</i> , 372 U.S. 744 (1963)	11
<i>Illinois Commerce Comm'n v. ICC</i> , 787 F.2d 616 (D.C. Cir. 1986)	10
<i>Illinois v. ICC</i> , 687 F.2d 1047 (7th Cir. 1982).....	4, 10
<i>New York Dock Ry. v. United States</i> , 609 F.2d 83 (2d Cir. 1979).....	6
<i>Norfolk & W.R.R. v. American Train Dispatchers</i> , 111 S. Ct. 1156 (1991).....	3

IV

Cases—Continued:	Page
<i>Schaffer Transp. Co. v. United States</i> , 355 U.S. 83 (1957).....	11
<i>Simmons v. ICC</i> , 871 F.2d 702 (7th Cir. 1989).....	3
<i>United States v. Capital Transit Co.</i> , 325 U.S. 357 (1945).....	11
<i>Wisniewski v. United States</i> , 353 U.S. 901 (1957).....	11

Statutes and regulations:

Interstate Commerce Act, 49 U.S.C. 10101 *et seq.*:

49 U.S.C. 10101a.....	2
49 U.S.C. 10101a(1).....	4
49 U.S.C. 10101a(2).....	2
49 U.S.C. 10101a(4).....	4
49 U.S.C. 10101a(5).....	4
49 U.S.C. 10101a(12).....	5, 6, 11
49 U.S.C. 10101a(13).....	4
49 U.S.C. 10505.....	3, 5
49 U.S.C. 10505(a)(1).....	4, 8, 9, 12
49 U.S.C. 10505(a)(2)(B).....	4
49 U.S.C. 10505(g)(2).....	6, 12
49 U.S.C. 11343-11345.....	3
49 U.S.C. 11344.....	4, 6
49 U.S.C. 11344(d).....	8, 9, 10, 12
49 U.S.C. 11344(d)(1).....	3
49 U.S.C. 11347.....	6, 13

Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat.

1912 (49 U.S.C. 10505(a)).....	2, 8, 9, 11
--------------------------------	-------------

49 C.F.R. :

Section 1150.31.....	2
Section 1152.50.....	2
Section 1180.2(d)(7).....	2
Pt. 1201.....	3

Miscellaneous:

H.R. Rep. No. 1430, 96th Cong., 2d Sess. (1980).....	2, 3
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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 936 F.2d 1335. The decision of the Interstate Commerce Commission (Pet. App. 24a-35a) is reported at 6 I.C.C.2d 1004. The initial decision of the Commission's administrative law judge (Pet. App. 36a-85a) is reported at 6 I.C.C.2d 969.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1991. The petition for a writ of certiorari

was filed on September 26, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Staggers Rail Act of 1980, 49 U.S.C. 10505(a), requires the Interstate Commerce Commission to exempt a transaction or class of transactions from an otherwise applicable provision of the Interstate Commerce Act when the Commission finds: (1) that application of the provision is not necessary to carry out the rail transportation policy (RTP) set forth in 49 U.S.C. 10101a, and (2) either that the transaction (or class of transactions) is of limited scope or that application of the provision is not needed to protect shippers from abuse of market power.¹ The RTP establishes "a specific rail transportation policy to guide the Commission in its duties in regulation of the railroad industry." H.R. Rep. No. 1430, 96th Cong., 2d Sess. 80 (1980). The policy includes 15 subparagraphs that address, in general terms, such issues as competition, safety, ratemaking, reduction of regulatory barriers, cooperation with the States on intrastate regulatory matters, national defense, and wages and working conditions for employees.

¹ A carrier may seek an exemption from a specific provision of the Interstate Commerce Act by filing an individual petition for exemption or by invoking general exemptions that the Commission has provided for certain classes of transactions. See 49 C.F.R. 1150.31, 1152.50, and 1180.2(d)(7). When an individual exemption is sought, as in this case, the transaction may not be carried out until an exemption is considered and granted by the Commission. An applicant typically invokes a general exemption by giving specified notice; the Commission retains the authority to revoke the exemption with respect to a particular transaction.

Congress enacted Section 10505 in order to facilitate deregulation of the rail industry. H.R. Rep. No. 1430, 96th Cong., 2d Sess. 105 (1980). Upon implementation of that provision, Congress anticipated, "as many as possible of the Commission's restrictions on changes in prices and services by rail carriers will be removed and * * * the Commission will adopt a policy of reviewing carrier actions after the fact to correct abuses of market power." *Ibid.*

b. Under 49 U.S.C. 11343-11345, ICC approval is required for a sale of a railroad's line and for a transfer of trackage rights between railroads. *Norfolk & W.R.R. v. American Train Dispatchers*, 111 S. Ct. 1156, 1159 (1991).² Section 11344(d)(1) requires the ICC to approve such a transaction between a Class I rail carrier and a carrier other than a Class I rail carrier unless the Commission finds that "there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade" as a result of the transaction. 49 U.S.C. 11344(d)(1).³ If the Commission finds that such anticompetitive effects are likely to result from a transaction, it may still approve the transaction unless it concludes that anticompetitive results "outweigh the public interest in meeting significant transportation needs." Thus, the Commission is not called upon to consider that "public interest" unless it first finds that the trans-

² Trackage rights allow a carrier to operate its trains over the tracks of another carrier. *Simmons v. ICC*, 871 F.2d 702, 712 (7th Cir. 1989).

³ Under the ICC's regulations, railroads are divided into classes based upon their annual operating revenues. 49 C.F.R. Pt. 1201, Instruction I-1. Class I carriers are the largest carriers, currently defined by the Commission as railroads earning in excess of \$94.4 million in annual gross revenues.

action would likely have anticompetitive effects. See *Illinois v. ICC*, 687 F.2d 1047, 1053 (7th Cir. 1982).

2. a. In 1989, the Indiana Rail Road Company (IRRC) applied for an exemption from Section 11344 with respect to its acquisition of approximately 90 miles of rail line from the Illinois Central Railroad Company (IC) and trackage rights over an additional 16.2 miles of IC track. When local communities and labor organizations expressed opposition to the transaction, the ICC assigned the matter to an administrative law judge for an oral hearing and an initial decision. The hearing focused on IRRC's ability to continue rail service upon acquisition of the line, the impact of the transaction on the local communities, the elimination of 19 local railroad jobs, and reduction in pay for the remaining railroad employees. See Pet. App. 41a-60a.

After analyzing the protesting parties' contentions, the ALJ concluded that IRRC and IC had demonstrated, in accordance with Section 10505(a)(2)(B), that application of Section 11344 was not necessary to protect shippers from an abuse of market power. Pet. App. 62a, 68a, 72a. With respect to the remaining condition for an exemption, 49 U.S.C. 10505(a)(1), the ALJ also determined that, because the transaction would promote competition, it was consistent with those factors in the rail transportation policy that were pertinent to that issue (see 49 U.S.C. 10101a(1), (4), (5), and (13)). Pet. App. 61a, 63a-64a, 69a.

Although he acknowledged that Commission policy would limit the inquiry to those factors, the ALJ nevertheless construed Section 10505(a)(1) to require consideration of other elements of the RTP. Pet. App. 70a-71a. Consequently, the ALJ went on to find that the transaction would be contrary to the RTP, referring to the impact on wages paid to rail employees

(see 49 U.S.C. 10101a(12)) and, without citing any element of the RTP, his belief that IC would operate the line better than IRRC. Pet. App. 71a. On that basis, the ALJ denied the requested exemption. *Id.* at 72a.

b. The Commission reversed the ALJ and granted an exemption. Pet. App. 24a-35a. The Commission rejected the ALJ's ruling that Section 10505 required consideration of elements of the RTP other than those addressing competition, explaining (Pet. App. 27a-28a):

In determining whether regulation of a transaction proposed for exemption under section 10505 is necessary to carry out the RTP, our analysis generally focuses on the criteria relating to the underlying statute from which the exemption is sought. We need not extend our analysis beyond what we would address in an application proceeding itself. * * * Section 10505 provides a shortcut analysis to see if regulation—in this case under section 11344(d)—is necessary. If section 11344(d) does not require review of particular issues, neither does the section 10505 process.

Under section 11344, Congress has limited the Commission's jurisdiction to consideration of whether a transaction would have a substantial adverse impact on competition. If the Commission finds no substantial adverse impact it must approve the transaction. Accordingly, our analysis in the exemption context need not be broadened beyond consideration of those aspects of the RTP that deal with competition. We need not look at RTP issues unrelated to the purposes of section 11344.

The Commission sustained the ALJ's finding that the proposed transaction would enhance competition, rejecting petitioners' contention that they had not had sufficient opportunity to present evidence relevant to that issue. Pet. App. 29a-30a. That finding, the Commission concluded, was "dispositive of the RTP issue." *Id.* at 30a.

Likewise, the Commission determined that the ALJ's finding regarding the effect of the transaction on wages did not provide a basis for denial of an exemption. Pet. App. 31a. The Commission explained that "section 11344(d) does not include the effects on employees as a decisional criterion" and, for transactions under that Section, "such concerns are addressed only through the protective conditions required by section 11347." *Ibid.* The Commission indicated, however, that the RTP factor on which the ALJ relied, 49 U.S.C. 10101a(12), was satisfied here. The Commission reasoned that Section 10101a(12) refers to "fair wages and safe and suitable working conditions" (*ibid.*); that the ALJ found that safety was not at issue; and that the protective conditions mandated by Section 11347 would sufficiently protect the wages of affected workers. Pet. App. 31a.⁴

3. Petitioners, among others, sought judicial review in the D.C. Circuit. The court of appeals upheld the Commission's decision. Pet. App. 1a-23a.

⁴ The conditions referred to are the so-called *New York Dock* conditions. These conditions were approved by the Second Circuit in *New York Dock Ry. v. United States*, 609 F.2d 83 (1979), as satisfying the Commission's obligations under Section 11347, and have been imposed in numerous rail consolidation proceedings since that time. Under 49 U.S.C. 10505(g)(2), the Commission is required to observe the requirements of Section 11347 when it grants an exemption from Section 11344. The Commission's order imposed those conditions in this case. Pet. App. 35a.

The court rejected petitioners' contention that the Commission was obligated to consider elements of the RTP other than those relating to competition. The court noted that "[n]ot every provision of the Interstate Commerce Act regulating railroads and the Staggers Rail Act * * * implements each one of section 10101a's many goals." Pet. App. 6a. Thus, the court continued, "since a section 10505(a) exemption may be granted only from 'a provision of this subtitle,' rather than the statute as a whole, * * * one must first decide in what respect the 'provision' implements the rail transportation policy. * * * [I]f a provision does not implement a particular goal set forth in the rail transportation policy, it follows in the language of section 10505(a) that application of the provision is not necessary to carry out the goal." *Id.* at 7a.

Noting that "the Commission would have been required to approve the sale of these rail lines and trackage rights [under Section 11344(d)(1)] if there would have been no anticompetitive effect" (Pet. App. 8a), the court determined that the Commission was justified in limiting its analysis of the RTP to those factors involving competition.

The court also reasoned that "[i]f, as petitioners urged, the Commission had made findings about each aspect of the rail transportation policy possibly affected by the sale, the exemption process would have been broader and possibly more onerous than the proceeding from which the exemption was sought." Pet. App. 8a-9a. In particular, the court ruled, the Commission was not required to determine that the transaction "would 'encourage fair wages,' 49 U.S.C. § 10101(a)(12), a goal Congress in section 11344(d)(1) did not deem pertinent in regulating the sale of rail lines or trackage rights." Pet. App. 9a.

Judge Silberman concurred in a separate opinion. Pet. App. 15a-23a. He would have held that the Commission's interpretation of Section 10505(a)(1) was "a permissible construction and application of the statute" (Pet. App. 22a), which was therefore binding on the court under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984). In Judge Silberman's view, however, "[t]he Commission should not be barred in the future from adopting another, more pro-regulatory, interpretation of the ICC's exemption authority, perhaps more sympathetic to the interest of affected workers." Pet. App. 15a.

ARGUMENT

1. Petitioners contend (Pet. 14-19) that Section 10505(a) requires the Commission to consider each factor of the rail transportation policy in deciding whether to grant an exemption from the procedure and standards prescribed by Section 11344(d). However, the Commission's interpretation is entirely consistent with the language of Section 10505(a), the statutory structure, the purpose of the exemption provision, and common sense. At a minimum, therefore, it is a permissible interpretation of the statute that is entitled to enforcement under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, *supra*. There is no conflict between the court of appeals' decision and the decisions of this Court or of any other court of appeals, nor is there any other consideration warranting this Court's review.

Section 10505(a)(1) does not require the Commission, when it acts on a request for an exemption from an otherwise applicable provision of the Interstate Commerce Act, to determine that the proposed transaction is consistent with each element of the rail transportation policy. Instead, the Commission's

mandate is limited to determining whether application of the provision from which an exemption is sought is "necessary to carry out the transportation policy of Section 10101a." 49 U.S.C. 10505(a)(1). As the Commission and the court of appeals recognized, when application of the provision in question is not designed to further some of the elements of the RTP, it cannot fairly be said that the provision's application is "necessary to carry out" those elements. Thus, in the context of a request for an exemption, the language of the statute is fairly read to limit the Commission's consideration of the RTP to those elements corresponding to the standards that would be applied in the absence of an exemption.

The structure and purpose of the statute lend further support to that interpretation. Section 10505(a) sets forth criteria under which *an exemption* is available from an otherwise applicable statutory provision. Thus, if an exemption is denied, the effect is to require an applicant to satisfy the otherwise applicable statutory criteria. Under petitioners' interpretation, an exemption might be denied on the basis of a consideration that would be completely irrelevant in the subsequent full-blown proceeding. What is more, that anomalous result would contradict the purpose of the exemption procedure, which is to provide a streamlined means of obtaining approval for transactions that would otherwise require more searching review. Cf. *CMC Real Estate Corp. v. ICC*, 807 F.2d 1025, 1031-1032 (D.C. Cir. 1986); *American Trucking Ass'n v. ICC*, 656 F.2d 1115, 1119-1120 (5th Cir. 1981).

This case graphically illustrates the peculiar implications of petitioner's position. In a full-blown proceeding under 49 U.S.C. 11344(d), the Commission would be obligated to approve the transaction at issue if it found that the transaction was not likely to

result in “substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States.” See *Illinois v. ICC*, 687 F.2d at 1053. Although the Commission determined that the transaction at issue here was actually pro-competitive (Pet. App. 30a & n.12, 69a), petitioners contend that an exemption should have been denied on the basis of other factors. However, if (1) the exemption were denied, (2) IRRC and IC then sought approval in a proceeding under Section 11344(d) itself, and (3) the Commission adhered to its finding regarding the transaction’s pro-competitive effects, the Commission would be barred by law from withholding approval on the basis of the factors on which petitioners rely. Quite reasonably, the Commission and the court of appeals construed the statute not to require that self-defeating approach.

The decision in this case is consistent with the Commission’s decisions, the D.C. Circuit’s prior decisions, and decisions of other courts of appeals. See, e.g., *CMC Real Estate Corp. v. ICC*, 807 F.2d at 1033; *Illinois Commerce Comm’n v. ICC*, 787 F.2d 616, 627 (D.C. Cir. 1986); *Brae Corp. v. United States*, 740 F.2d 1023, 1046-1047 (D.C. Cir. 1984), cert. denied, 471 U.S. 1069 (1985); *Blackstone Capital Partners, L.P.—Control Exemption—CNW Corp.*, 5 I.C.C.2d 1015, 1019 (1989), aff’d *sub nom. Brotherhood of Ry. Carmen v. ICC*, 917 F.2d 1136 (8th Cir. 1990).⁵ While

⁵ Contrary to petitioners’ contention (Pet. 17-18), the court of appeals did not “misread” its decision in *Brae Corp.* In that case, the court ruled that the Commission should have given broader consideration to the RTP, but did not suggest that that consideration should extend to all RTP factors. In any event, intra-circuit conflicts are matters for the courts of appeals, rather than this Court, to resolve. *Wisniewski v. United*

there have been disputes as to which elements of the RTP must be considered in the context of requests for exemptions from particular provisions, no court has held that the Commission must consider factors not relevant to the underlying statutory provision from which exemption is sought.

None of the decisions of this Court on which petitioners rely (Pet. 15-16) suggests otherwise. In those cases, this Court had no occasion to address the scope of the Commission's responsibility to consider elements of the RTP in granting exemptions under Section 10505(a). See *United States v. Capital Transit Co.*, 325 U.S. 357 (1945); *Schaffer Transp. Co. v. United States*, 355 U.S. 83 (1957); *ICC v. New York, N.H. & H.R.R.*, 372 U.S. 744 (1963); *American Trucking Ass'n v. Atchison, T. & S.F. Ry.*, 387 U.S. 397 (1967). Of course, because the Commission does consider those elements of the RTP that are implicated by the provision from which an exemption is sought, its interpretation is entirely consistent with the general principles cited in the petition. In this case, the RTP was the "yardstick" (Pet. 16) employed by the Commission. The Commission simply declined to consider those elements that were immaterial to the provision from which an exemption was sought.

Finally, the Commission did address, in the alternative, the ALJ's determination that the transaction would be inconsistent with one element of the RTP, 49 U.S.C. 10101a(12). That subsection refers to the policy of "encourag[ing] fair wages and safe and suitable working conditions in the railroad industry." *Ibid.* The Commission agreed with the ALJ that "safety was not a concern here," and it found that

States, 353 U.S. 901 (1957). Petitioners did not seek rehearing *en banc* of the panel's decision.

“the wages of the affected IC employees are protected by the imposition of standard labor protection provisions.” Pet. App. 31a. That determination would be sufficient to sustain the Commission’s decision even if the Commission were required to look beyond the competitive aspects of the transaction.⁶

2. There is no merit to petitioners’ abbreviated argument that the labor protective conditions are insufficient to vindicate the RTP’s concern for rail employees in the context of an exemption from 49 U.S.C. 11344(d). See Pet. 19. Had the transaction been considered under Section 11344(d) itself, the Interstate Commerce Act would have mandated no more than the imposition of those conditions. Section 10505(g)(2) provides, in turn, that the Commission may not exercise its authority to grant an exemption “to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle.” The most plausible accommodation of those provisions is the one selected by the Commission—under which it imposes the same labor protective conditions when it grants an exemption as the statute would mandate in the absence of an exemption.

Petitioners offer no authority to support their implausible assertion that Section 10505(a)(1) requires more attention to labor interests in the context of an application for an exemption from Section 11344(d) than the latter Section requires on its own terms. Moreover, especially given the limited effect of the transaction on labor (see Pet. App. 31a n.14), the Commission was justified in concluding that imposition of the standard conditions was sufficient to pro-

⁶ The ALJ also relied on his determination that IC would manage the line at issue more effectively than IRRC. Pet. App. 71a. He did not, however, cite any element of the RTP that would call for consideration of that question.

tect the interests of employees affected by the transaction at issue. See *Brotherhood of Maintenance of Way Employees v. United States*, 366 U.S. 169, 176 (1961) (concluding that the legislative history of Section 11347's predecessor "clearly reveal[s] an understanding that compensation, not 'job freeze,' was contemplated" by the Act).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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